IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

TRUST PETITION NO.5 OF 2004

The Official Trustee, Maharashtra State
having his Office at Second floor,
Old Secretariat (Annex),
Mahatma Gandhi Marg, Kala Ghoda,
Mumbai-400032.
....Petitioner.

Vs.

M/s. Earth Designers & Developers Pvt. Ltd.
A company incorporated under the
Companies Act, 1956, and having its
Registered Office at 2/22, Earth House,
Babu Genu Road, Princess Street.
Mumbai.
....Respondents.

Mr. E.P. Bharucha along with Saumya Srikrishna and Narayan Sahu i/by A.B. Patil for the Petitioner.

Aspi Chinoy alongwith P.K. Samdhani, V.K. Merchant i/by Kishore Thakordas for the Respondents.

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CORAM : A.S. AGUIAR,J.
DATED : 9/3/2005.

ORAL JUDGMENT:

1. This petition is filed by the Official Trustee appointed under Section 25 of the Official Trustee Act,1913 seeking directions pursuant to liberty granted to the parties in Trust Petition No.5 of 1995 to apply to the court for necessary

clarification and directions etc. of the order dated 8.8.1997 passed by this court in Trust Petition No.5 of 1995.

2. By this petition the Official Trustee is seeking a declaration that the respondents purchasers/developers are entitled to use only FSI of 2294 sq.ft by way of TDR in respect of the property described in Schedule A and nothing more and for other reliefs.

3. It is the case of the petitioner that the petitioner had entered into Memorandum of Understanding with the respondents dated 29.11.1994 granting respondents development rights in respect of only 2294 sq.ft. in Plot No.C.S.No.113. Subsequently one Public Interest Petition No.147 of 1995 was filed in this court opposing sale of this property hence, the respondents filed Trust Petition No.5 of 1995 for approval of the sale based on the Memorandum of Understanding and on the N.O.C. granted by the Income Tax Department. By order dated 8.8.1997, the Trust petition was disposed of. The Public Interest Petition No.147 of 1995 was also disposed of by the said order. Pursuant to the said order, the petitioner executed power of attorney in

favour of the respondents and the respondents deposited Rs.35/- lacs with the petitioner. However, realising that the power of attorney did not mention the specific area which was given for the purpose of development, the petitioner trust addressed a letter dated 19.9.1997 to the respondents clarifying the position that only FSI of 2294 sq.ft. has been sold to the respondents. The respondents replied the said letter by their letter dated 20.9.1997 stating that they are entitled to entire FSI potential of the said plot. Thereafter, the petitioner called upon the respondents to return the power of attorney so that the exact area granted to the respondents could be mentioned in the power of attorney. However, the respondents failed to return the said power of attorney to the petitioner. On 20.11.1997, this court passed an order by way of speaking to the minutes of the order dated 8.8.1997. Thereafter, the petitioner applied to the court for speaking to the minutes of the order dated 8.8.1997 which application came to be dismissed and the court declined to clarify or quantify the exact area to be given to the respondents. On realizing that the respondents were intending to consume FSI more than 2294sq.ft., the petitioner gave a public notice and revoked the power of attorney. SLP filed by the

petitioner challenging the order dated 8.8.1997 came to be dismissed on 22.9.1998, The respondents also filed Contempt Petition No.48 of 2002 against the petitioner for recalling the power of attorney. On 6.6.2002 MHADA i.e. Maharashtra Building Repairs and Reconstruction Board granted N.O.C. to the redevelopment proposal of the respondents and granted F.S.I. of 1400.13sq.mtrs. i.e. 14000sq.ft. On 29.8.2002, the petitioner learnt that the respondents had submitted a proposal whereby the respondents were going to demolish the chawls and construct a new building in its place and this was being done so that the respondents could avail of the benefit of certain Development Control Regulation and accordingly obtained F.S.I. of more than 2294 sq.ft. Hence, the present petition came to be filed on 27.4.2004 seeking relief of declaration that the respondents are not entitled to use any FSI more than 2294sq. ft. by way of TDR in respect of the property described in Exhibit-A.

4. It is the contention of the petitioner that it was clearly understood by both the parties to the Memorandum of Understanding that only FSI of 2294 sq.ft. will be utilized by the respondents. The Memorandum of Understanding dated 29.11.1994 states

that the sale of the premises is on AS IS WHERE IS BASIS. (The plot is having balance FSI of 2294.85 sq.ft.).

5. The memorandum of understanding grants development rights to the respondents in respect of a specific area. The recitals mentions balance F.S.I. of 2294sq.ft. As per the 4th Schedule, the total area of the plot Survey No.113 admeasaures 1560.89sq. yards equivalent to 1305.10 sq.mtrs. This includes the Temple, Dharamshala and chawl standing on the said land. It is the contention of the petitioner that the memorandum of understanding gives restricted development rights to the respondents to the extent of 2294 sq.ft. It is further pointed out by the petitioner that the Minutes of meeting held on 10.11.1994 (Exh.V) expressly refers to balance F.S.I. of 2294 sq.ft. The Architect’s report at Exh.B, The Memorandum of Understanding dated 29.11.1994 at Exh.C between the petitioner and the respondents also expressly refers to the balance F.S.I. of 2294sq.ft. sold for the corresponding price of Rs. 1,36,00,000/-. It is the contention of the petitioner that the Income Tax Department also grated N.O.C. on the basis of specific area of F.S.I. of 2294 sq.ft. The

original Trust Petition No.5 of 1995 also refers the memorandum of understanding in respect of 2294 sq.ft. F.S.I. The petitioner further points out that in the Trust Petition No.18 of 1981 filed by the petitioner against M/s. Vijay Associates, it was clarified that the existing balance F.S.I. was 6794 sq.ft. out of which 4500 sq.ft. was apportioned to M/s. Vijay Associates and the balance F.S.I. is 2294 sq.ft. which has been allotted to the respondents for the price of Rs.1,36,00,000/-.

6. It is the petitioner’s contention that the Memo of Understanding is in respect of development of 2294-sq.ft. F.S.I. However, the respondents are now seeking to consume more than three times that area without paying the corresponding price in respect of the balance F.S.I. which they would be utilizing.

7. It is the petitioner’s contention that the respondents merely purchased TDR of 2294 sq.ft. under Development Control Regulation 67. The respondents however now seek to construct on the land itself by making a proposal of demolition of the chawl. This is clearly contrary to the

provisions of even the order dated 8.8.1997. The respondents are not entitled to additional FSI under DC Regulation 33(7) in as much the same is available only in respect of reconstruction of a cessed building by a co-operative housing society. In the instant case the land has not been sold to the respondents and consequently there can be no question of additional FSI being available.

8. On the other hand, it is the contention of the respondents that they are entitled to entire FSI potential of the trust property in view of the Minutes of order dated 8.8.1997 filed in this court in Trust Petition No.5 of 1995. Clause No.2 of the Minutes of order clearly sets out that the consideration of Rs.1,36,00,000/- is for the entire F.S.I. potential of the plot by way of transfer of T.D.R. It is further pointed out that the Memorandum of Understanding is clearly a document of sale of the temple and chawl appertaining to the land. However, in view of the Public Interest petition filed in the court and objections raised to the sale of the temple, the parties i.e. Official trustee and the respondents decided to get over the difficulty and filed the Minutes of order in order to avoid the sale of the temple, chawl and land but

at the same time availing the entire F.S.I. benefit of the property. Clause No.1 of the Minutes of order dated 8.5.1997 clearly states that there shall not be any sale of the temple, chawl or temple land and that temple land and its properties shall continue to vest in the Official Trustee and that the petitioners therein i.e. the respondents herein would avail of only the privilege of the F.S.I. available in respect of the property in the form of T.D.R. in accordance with Development Control Regulation 67.

9. It is pertinent to note that prior to April,1995, D.C. Regulation, 67 was non existent, therefore the Memo of understanding dated 29.11.1994 could not have restricted the transaction to the sale of only the F.S.I. of 2294 sq.ft. The Minutes of order were filed in Petition No.5 of 1995 clearly with the view to over come the difficulty of sale of the temple and the other properties. Further more, the Development Control Regulation, 67 which gives the respondents benefit of entire F.S.I. potential of the plot of "2" requires that the consent of the existing tenants be obtained. It was in view of this, that Clause No.5 of the Minutes of order required the Official Trustee to grant a power of

attorney in favour of the petitioners/respondents herein for the purpose of negotiating and obtaining consent from the tenants in occupation of the chawl and for reconstruction of the chawl so as to avail of the entire F.S.I. of the property. Clause No.6 of the said Minutes of order speaks of compliance of Municipal rules, regulations and guide-lines applicable to the heritage properties. Pursuant to the said Minutes of order, the petitioner have executed power of attorney in favour of the respondents and permitted the respondents to submit proposal of plans for reconstruction and redevelopment of the property.

10. Clearly therefore, when these minutes of order were filed, the Official Trustee was aware or of the entire F.S.I. potential of the plot in question.

11. Pursuant to the said power of attorney granted in favour of the respondents, the respondents obtained consent of the tenants, submitted plans and obtained N.O.C. from MHADA as well as Approval of the Heritage Committee. It is further pointed out that the plans have been approved and the State Government has also accorded sanction for availing T.D.R. of 1400 sq. mtrs. i.e. 14000 sq.ft.

12. From the above, it is clear that the petitioner was fully aware that what was being conveyed to the respondents was not just 2294 sq.ft. F.S.I. but the entire potential F.S.I. of the said property which included temple and the chawl. It is therefore, now too late in the day for the petitioner to seek clarification of that order. The petitioner has approached this court for clarification and directions as sought for by him which reliefs were earlier rejected by this court as well as Supreme Court in the SLP filed in the Supreme Court. In view of the above, the question of granting any relief sought for by the petitioner does not arise. Hence, petition dismissed. No order as to costs.

(A.S.AGUIAR, J.)